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# NOMINATION OF HON. FRANK Q. NEBEKER

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## HEARING BEFORE THE COMMITTEE ON VETERANS' AFFAIRS UNITED STATES SENATE ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

THE NOMINATION OF HON. FRANK Q. NEBEKER TO BE CHIEF JUDGE  
OF THE UNITED STATES COURT OF VETERANS APPEALS

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MAY 15, 1989

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## NOMINATION OF HON. FRANK Q. NEBEKER TO BE CHIEF JUDGE OF THE UNITED STATES COURT OF VETERANS APPEALS

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MONDAY, MAY 15, 1989

U.S. SENATE,  
COMMITTEE ON VETERANS' AFFAIRS,  
*Washington, DC.*

The committee met, pursuant to notice, at 1:35 p.m., in room SR-418, Russell Senate Office Building, Hon. Alan Cranston (chairman of the committee) presiding.

Present: Senators Cranston, Murkowski, and Thurmond.

Chairman CRANSTON. The committee will come to order.

Good afternoon. I am pleased to welcome all of you to this hearing of the committee to consider the nomination of Frank Q. Nebeker to be the first Chief Judge of the United States Court of Veterans Appeals.

Frank, welcome to you and your wife, Louana.

Senator Warner, since I am going to make an opening statement, if you have other needs I would just as soon have you go ahead now and make your introduction.

Senator WARNER. Mr. Chairman, that would be a relief. I go before your other committee, the Foreign Relations Committee, in just a few minutes to introduce another lifelong colleague—all my colleagues are getting ahead in this world, and I'm beginning to get a little worried about where I am.

### STATEMENT OF SENATOR WARNER

It is my pleasure to come before the committee this afternoon to introduce the President's nominee to be Chief Judge of the U.S. Court of Veterans Appeals, Judge Frank Nebeker.

I have known Frank off and on, Mr. Chairman and members of the committee, for over three decades, and I am most pleased to have the opportunity today to speak on his behalf.

I appreciate very much the Chairman's recognition of his wife, Louana, and their daughters, Cara and Melia, and their son, Mark.

Judge Nebeker is a man of integrity and skill, and I can testify to that, Mr. Chairman. I had been at the U.S. Attorney's Office for about a year when Frank Nebeker joined that office, and although he alleges that I taught him a few things in the beginning, my recollection is that he has always acquitted himself as he does today, with total skill and honor, and in an admirable fashion.

Over the years of our friendship I have always found Judge Nebeker to be independent-minded. I know that's a qualification that the chairman and the members of this committee respect, and indeed, the Members of the Senate, and I think it uniquely qualifies him for this important responsibility.

As he leaves his post as Director of the U.S. Office of Government Ethics he brings before the committee an impressive record of achievement. I am pleased, therefore, to have had this opportunity to briefly recognize him.

I thank the chairman for his courtesies.

Chairman CRANSTON. Thank you.

#### OPENING STATEMENT OF CHAIRMAN CRANSTON

Frank, I am pleased to note that you are also accompanied by your daughters, Cara and Melia, and your son, Mark, and his wife, Terri. I also understand that your friend and former colleague on the District of Columbia Court of Appeals, Judge Gerard Reilly, a retired Chief Judge of that court, is also here with you. I extend a special warm welcome to all of your family members and to Judge Reilly.

As I told you during our April 14 meeting, Frank, I offer you my sincere congratulations on your nomination.

The hearing on this nomination is one of a number of very meaningful, truly historic events that are occurring this year as the result of the enactment last year of laws elevating the Veterans' Administration to Cabinet-level status and providing for judicial review, and establishing the new Court of Veterans Appeals.

In March we conducted confirmation hearings on the nominations of Ed Derwinski and Tony Principi to serve as the first Secretary and Deputy Secretary, respectively, of Veterans Affairs, and they have since been confirmed and sworn in. On March 15 we celebrated the establishment of the Department of Veterans Affairs. Those events were manifestations of the very high level of appreciation of the American people for the courage, service, and sacrifice of those who have served in the Armed Forces and of the great importance that our Nation attaches to the programs by which we seek to meet our obligations to our Nation's veterans.

Today's hearing symbolizes the fact that those whose service has preserved our Government of laws, not of men, are entitled to a full measure of justice in their relations with their Government.

The sustained effort in the Senate to provide for judicial review of Veterans' Administration decisions denying claims for benefits covered a span of nearly 13 years. Members of this committee worked long and hard and played vital roles in developing legislation to ensure that veterans have access to the courts and to the assistance of counsel. Thus, this hearing is specially significant for us and we are delighted that this day has finally arrived.

Regarding the nominee, I believe that many aspects of his background highly qualify him to be the first Chief Judge of the new Veterans Court. Committee staff has thoroughly reviewed his questionnaire and financial statements, and we are assured that there are no financial conflicts. We will print those documents and a

recent letter from Judge Nebeker in the record, along with correspondence he and I have had.

[The documents and letters referred to appear on pp. 21-53.]

Chairman CRANSTON. Judge Nebeker's qualifications are very impressive. During more than a decade as an Assistant U.S. Attorney in the District of Columbia, including 8 years as Appellate Division Chief, he gained wide experience and expertise in the field of judicial review of administrative actions.

For the next 18 years, until 1987, he served as an Associate Judge of the District of Columbia Court of Appeals, the District of Columbia's highest court. Committee staff has undertaken a painstaking review of a substantial sampling of Judge Nebeker's opinions as an appellate judge, including the opinions cited in his questionnaire and opinions in areas analogous to veterans' claims for benefits. Those opinions disclose strong intellect, fair-mindedness, and clear, concise expression.

Throughout his service on the Appeals Court, Judge Nebeker was active as a leader in the continuing education of Federal and State appellate judges. He has planned and taught seminars on appellate advocacy and opinion writing, and helped found the Appellate Judges Graduate Program at the University of Virginia.

For the past year and a half Judge Nebeker has served with distinction as the Director of the Office of Government Ethics.

What I have described is an outstanding background for a Chief Judge of this new Court of Veterans Appeals, but there is one other very valuable and practical facet of Judge Nebeker's experience. He has just completed moving the Office of Government Ethics into new offices, thereby gaining invaluable experience in logistics and relationships with the General Services Administration that can be well used in finding the new court an immediate, temporary home and, eventually, permanent offices and courtrooms.

By a very strange, amusing coincidence, he has told us that he thinks he can obtain the old Government Ethics office space as the court's initial temporary home.

There is one aspect of Judge Nebeker's background which has caused concern; that is his memberships in two local organizations—the Cosmos Club, which until May 1988 had a policy excluding women from membership, and the Lawyers Club, which has no such written policy but, as a matter of practice, has never admitted a woman to membership.

The American Bar Association's commentary to Canon 2 of its Code of Judicial Conduct states, "It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin."

In the case of another pending nomination involving the question of membership in a discriminatory private club, that of Vaughn Walker to the U.S. District Court for the Northern District of California, I expressed, in an April 4 letter to the chairman of the Judiciary Committee, my opposition to that nomination. In Mr. Walker's case, I concluded that his actions and statements regarding his membership in the Olympic Club of San Francisco, which has a written membership policy excluding women, demonstrated an atti-

tude and an insensitivity which is unacceptable for a member of the Federal judiciary.

I believe that the proper procedure is for the Senate to make careful case-by-case determinations in each such case and not to apply an over-arching policy that fails to distinguish the line between a nominee who is really working for constructive change and one who merely says he is.

First, on the issue of working for change within the club, there is no evidence that, prior to being nominated, Mr. Walker had done anything—other than vote—to open the Olympic Club to women. Judge Nebeker has a record, substantiated by committee staff investigation, of having worked extensively and successfully to bring about the admission of women to the Cosmos Club. In his own words, he went “far beyond a mere offer to support another’s efforts.” He indicates he is seeking to do the same thing in the Lawyers Club, and his record in such activities at the Cosmos Club lends credibility to his assertion.

Second, Mr. Walker defended the Olympic Club’s discriminatory policy—although saying he opposed it—and mischaracterized the club’s position on maintaining that policy. He described the club as moving toward change when it in fact was deeply involved in hostile litigation and strenuously fighting coverage under a San Francisco antidiscrimination ordinance, and he asserted that the exclusion of women was different from the exclusion of blacks since women had other athletic facilities in San Francisco they could use. Judge Nebeker’s attitude toward the problem is very different. He does not defend the exclusion, but simply states that it is “an outmoded tradition reflective of a period of male-dominated commercialism” and hence is susceptible to efforts to overcome the “inertia of the past.”

Third, the nature of the clubs is quite different. The Olympic Club until last year excluded both women and minorities, membership being limited in the bylaws to white males as late as 1968. The Lawyers Club, in contrast, has no formal policy of exclusion, and we have no evidence that any woman has ever been turned down because of her gender. Given the fact, according to Judge Nebeker, that women are currently being nominated, it seems reasonable for him to await the outcome of the current efforts he and others are undertaking to admit women to membership.

In sum, I believe that the Nebeker record of working for change is very different from the Walker record of defending his club’s discriminatory practices and belatedly resigning upon his second nomination. I will be asking Judge Nebeker a few questions regarding this issue and—I must note—I do not accept his very narrow view of “invidious discrimination,” but I do not see this matter posing any barrier to my support for his nomination.

Before closing I would like to comment on the effort Judge Nebeker has been making in recent weeks to plan and make preliminary preparations for the myriad tasks that must be completed for the new court to hit the ground running on September 1. In an April 10, 1989, letter to him I recommended, in view of the short period available, that he feel free to proceed with such activities during the pendency of his nomination, and he has been diligently doing so. He has also undertaken a review of the enabling legisla-

tion and provided the staff of both Committees on Veterans' Affairs with several excellent recommendations for revisions. Some of his proposals require prompt action, and I will be pursuing them in the context of both the fiscal year 1989 supplemental appropriations bill and a measure that House Committee Chairman Montgomery and I are developing together.

Chairman CRANSTON. Strom, do you have an opening statement?

#### OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Thank you, Mr. Chairman.

I am pleased to be here this afternoon for the confirmation hearing of Judge Frank Nebeker, the first nominee to the new Court of Veterans Appeals.

This is a historic occasion and I want to thank you, Mr. Chairman, for scheduling this hearing. It is my sincere desire that at such time as future nominees to the court are sent to us, we will be able to move quickly on them, as well.

I believe it is important that we do everything we can to assist in getting the full court in place and functioning.

Just as with the Cabinet legislation, the road to this new court has been a long one. Now we just need to get the court out of the starting blocks and running.

Mr. Chairman, Judge Nebeker has a background which will serve him well as Chief Judge of the court. He served for 2 years as a trial attorney in the Internal Security Division of the Department of Justice and served for 11 years as an Assistant U.S. Attorney.

Subsequently, he was elevated to the District of Columbia Court of Appeals in 1969, and served very ably there until 1987, when he was appointed Director of the Office of Government Ethics.

He has also served as Chairman of the Appellate Judges Conference of the American Bar Association and he has served his country as a second lieutenant in the National Guard.

Not only has he served in these capacities, but he has also published several articles in the Judges Journal of the American Bar Association.

Mr. Chairman, our nominee today comes before this committee with a proven record that he is a man of character and integrity. I urge this committee to approve his nomination expeditiously, and I am pleased to lend my strong support.

Mr. Chairman, I am due at the Supreme Court in about 10 minutes. Could I ask one question before I go?

Chairman CRANSTON. In that case I would like to swear in Judge Nebeker, pursuant to our rules.

Senator THURMOND. Yes.

[Witness sworn.]

Senator THURMOND. Thank you, Mr. Chairman. I just have one question.

As you know, section 4055 of the judicial review legislation passed last year permits the new court to sit not only in Washington but in other jurisdictions as well. Do you anticipate most of the appeals hearings will be held out in the States or back here in

Washington? And do you have any thoughts on how to decide where, around the country, court might be held?

Judge NEBEKER. Senator Thurmond, I am keenly aware of the decentralized nature of the veterans' claim process. It must be brought home to them; they should not be forced to come to Washington to get the issues resolved that they present.

I have no guess at this point as to how much money I'm going to put in the budget to permit travel. I'm sure we will wind up going to large centers of population throughout the country, at least divisions of the court. Beyond that, sir, I have no idea of how many cases will warrant traveling to other areas. Of course, we would have to schedule them so that we're not going for just one case.

Senator THURMOND. It appears that might be a great accommodation to a good many veterans, and maybe several cases in the same place could be arranged while you are there.

Thank you, Mr. Chairman.

Chairman CRANSTON. Thank you very much.

We would now welcome whatever remarks you would like to make at the outset of this hearing.

I do want to say for the record that we have a statement from Senator DeConcini that will appear in the record of this hearing.

[The prepared statement of Senator DeConcini appears on p. 15.]

#### TESTIMONY OF HON. FRANK Q. NEBEKER, NOMINEE FOR CHIEF JUDGE OF THE UNITED STATES COURT OF VETERANS APPEALS

Judge NEBEKER. Mr. Chairman, coming from a professional background as an advocate and a litigator, I know that it is best to start out when you appear before a tribunal such as this to state the relief that I seek. I ask that the President's judgment in nominating me to be the Chief Judge of the new United States Court of Veterans Appeals be vindicated by the committee's favorable vote recommending that the Senate confirm.

In asking this action, I recognize that it will then become my duty to vindicate the judgments of both the President and the Senate, and I pledge to do my best and offer my record after 36 years of public service as evidence of my ability to do so.

I am indeed aware that this is a rare moment in the history of the country for veterans who have offered themselves to ensure our national survival. For the first time, judicial review of veterans' claims will be provided.

It is strange that so much time has passed without an independent review of this kind of claims, given the litigation explosion in other areas of the law that I have witnessed in the last 20 years. There is, in addition, another highly unusual fact attendant to this event. Except for the end of the 19th century, after passage of the Judiciary Act of 1879, the creation of a new U.S. court without some antecedent is most unusual.

It will be my great honor to preside on the court and to pilot it to full growth as quickly as possible. I pledge that the court will provide access to justice in fact and in appearance throughout the country, consistent with its organic act. Those who served us in war and peace deserve no less.

Thank you, Mr. Chairman.

Chairman CRANSTON. Thank you very much for a very fine and very concise and brief statement of your purposes in this historic task that you will be undertaking.

I have quite a few questions I want to ask you.

First, Frank, what are your general views on the nature of the obligation that the Federal Government owes to those who have served on active duty in the Armed Forces?

Judge NEBEKER. Mr. Chairman, my general view is that I am gratified that the Congress of the United States has seen fit to provide the kind of benefits that it has, for my view is as with Winston Churchill: We owe so much to so few.

Chairman CRANSTON. What are your general views on the deference that an appellate tribunal should give to the conclusions and reasoning of an executive branch agency in deciding a claim for benefits from that agency?

Judge NEBEKER. Mr. Chairman, the question pointedly leaves out findings of fact, and I understand why you would do that.

On legal conclusions, it has been my experience throughout my professional career that a reviewing court does have authority to review and decide *de novo*, for itself, whether issues of law have been properly decided.

In the area of administrative expertise I subscribe to the notion that a court should give deference to that expertise when it comes, particularly, to an agency interpreting its own organic act or the acts that it administers.

Chairman CRANSTON. Thank you.

Would you ever have any hesitancy in reversing an unlawful VA action in a case that is within the jurisdiction of the Court of Veterans Appeals and properly before the Court?

Judge NEBEKER. Not at all, sir.

Chairman CRANSTON. What are your views on whether all cases of the Court of Veterans Appeals should be assigned to panels of judges, rather than certain types of more routine cases being assigned to a single judge?

Judge NEBEKER. Well, my view, Senator, is that a single judge decision, even though provided for by the statute, is a lesser decision than one that is decided by the regularly-constituted court—in this instance, either three judges or the court sitting *en banc*.

My view is that the veteran who got one head instead of three would rightly feel that he didn't get a fair shake and a full shake. It seems to me that all we would do is burden one judge to make a decision which would be tentative, because the veteran could well say, "That's not good enough. I want it to go before a panel of three." As we in appellate work throughout the country know, three heads are better than one.

Chairman CRANSTON. Please briefly outline the plans you have at this point regarding office and courtroom space and necessary equipment for the court and for initial staffing.

Judge NEBEKER. As you observed, Mr. Chairman, I do have a commitment to go back to 1625 K Street. I went there—

Chairman CRANSTON. Good.

Judge NEBEKER [continuing]. Last week and we decided where we could put a few doorways in and make some makeshift chambers and a makeshift courtroom.

I have pounded the streets myself looking for a building suitable for the court. I think I've found one, but the folks at GSA with whom I work cringe if I start talking about it too much, because they want to be in a position to bargain for the best price they can get per square foot. If I may, I would refrain from identifying the building, but it is one that is quite suitable.

Chairman CRANSTON. What plans do you have for establishing rules of practice and procedure?

Judge NEBEKER. I have suggested to your staff and the staff on the House side that the court would not be able to adopt rules for a number of months after it is created. During that period of time there would be a vacuum; litigants would not know when briefs were due, and so forth.

So I have urged that the corrective legislation include a provision that says, "The business of the court shall be conducted according to the Federal Rules of Appellate Procedure, except that the court may modify those rules."

Then, very shortly after the court is formed, I would undertake to bring about relevant and needed modifications in the Federal rules. To that end, Mr. Chairman, I have contacted representatives of the American Bar Association, the Federal Bar Association, and the District of Columbia Bar Association and asked them if they would themselves form a group, including the nonlawyer institutions or organizations that represent veterans in claims matters, and be prepared to come up with a recommendation to the court for a more permanent set of rules. Indeed, I am meeting with those folks this week.

Chairman CRANSTON. Is it your plan and intention, assuming that at least two associate judges have been seated by September 1 of this year, to begin hearing and disposing of cases as of that date?

Judge NEBEKER. Well, I'm not sure a case would be ripe for hearing on September 2, but certainly within a month or so we would be prepared to go ahead with the cases that are at issue.

Chairman CRANSTON. In connection with your status as a retired Associate Judge of the District of Columbia Court of Appeals, are you under any obligation to hear or decide cases or do any other work in order to receive your retirement payments?

Judge NEBEKER. No, sir, none.

Chairman CRANSTON. Am I correct in understanding that you will not participate in any DC Court cases or any other DC Court business during your tenure on the Court of Veterans Appeals?

Judge NEBEKER. That is correct, sir.

Chairman CRANSTON. Frank, as I indicated in my opening statement, an issue of concern has been your membership in two clubs, the Cosmos Club, which until last year had a policy excluding women from membership, and the Lawyers Club, which has not yet admitted any women as members.

At this point I will insert in the record our exchange of letters on this.

[The letters referred to appear on pp. 40-53.]

Chairman CRANSTON. Now I'd like to go over the issues involved very briefly.

First, could you please give me a brief description of the nature and size of the two clubs and of their policies and practices as of this date with respect to both minorities and women?

Judge NEBEKER. The Cosmos Club has, I guess, about 3,000 members. I think over 60 women have been admitted to the club in the past year. It was a year ago about now that the bylaws were voted, almost unanimously, by the club membership to admit women.

As far as the Lawyers Club is concerned, it is a group of a hundred lawyers—maybe 25 or 30 Federal judges. I may be overestimating that amount. Some neighboring State judges are considered to be associate members.

It is my understanding that, as of Monday of last week, one woman had been nominated to membership, and the president of the club called me during the week to inform me that he also intended to nominate another woman to the club and that the club governing body is meeting this week and he anticipates that there will be favorable action. Of course, he cannot be tied to that absolutely, but he anticipates that there will be, and I do too, sir.

Chairman CRANSTON. In the case of each club, would you please describe the efforts that you have made to bring about a change in each club's policies or practices regarding the admission of women and the degree of success that has been achieved?

Judge NEBEKER. Well, sir, as I pointed out to you, the success was 100 percent in the Cosmos Club. I did participate substantially in the processes that led to the vote. The leadership of the club had recognized that earlier efforts had been soundly defeated and that, if it was going to be done, it could not be done on the basis of an emotional reaction but rather had to be one that was rational. I think I participated quite successfully in that effort to obtain rationalization—a rational approach, I should say—to the ultimate question.

I had served originally on an ad hoc legal affairs committee, and after that—after the board itself proposed the change in its bylaws and took it to the membership—I participated in the proceedings that led to that favorable vote by speaking to various groups of the membership to that end.

In the Lawyers Club, as my letter indicates, I have importuned the presidents of the club for the past few years and other members of the club, particularly the older ones, with the notion that they have granddaughters who are now in the mainstream of commercial America; and while their attitudes might have been different at an earlier time, they ought not to be the same today.

Inviting someone's attention to his granddaughters is a successful endeavor, I have found.

Chairman CRANSTON. Regarding the Cosmos Club, would you say you were one of the principal members working for change?

Judge NEBEKER. No, I won't lay claim to that. I played a very substantial role in it, but I think others, such as the president of the club, played a more substantial role.

Chairman CRANSTON. Regarding the Lawyers Club, how long do you believe is a fair time to give for you and others to be successful in your efforts to achieve admission of women as members before you reconsider keeping your membership? Would the end of this year be a fair time to consider?

Judge NEBEKER. I think so, yes, but I don't think it will be that long at all.

Chairman CRANSTON. Good.

Judge NEBEKER. I'll bet you next week. [Laughter.]

Chairman CRANSTON. Good, That will be great.

The committee would like to hear from you when a change occurs, or if none has occurred by the end of the year, what your intention is at that time with respect to resigning or continuing your membership. So will you stay in touch on that basis?

Judge NEBEKER. I will honor that request, sir.

Chairman CRANSTON. Back to the space matter for one moment. What are your views on the space at the Old Post Office at Union Station that Sonny Montgomery and I haven been trying to put aside for you to be renovated when that building is totally renovated? We thought that would be a particularly fitting location in a grand and very historic building.

Judge NEBEKER. And it very well may be. My understanding is that it's a few years away. Realistically, if they say "two," they mean "four." I've found that out.

We cannot survive in the space at 1625 K Street for very long—6 months at the most. That is the reason that I have undertaken to find other leased space of a more permanent nature. Whether it needs to be our permanent location in perpetuity, I don't know. I would wait to see what the situation looks like after we've got a completion date in mind for the Old Post Office. I recognize it's very historic and beautiful place.

Chairman CRANSTON. It has been our feeling that probably 3 years would have to pass before it would be available, but I guess a decision has to be made fairly swiftly if you want space held for you.

Judge NEBEKER. Yes, and I'm prepared to work with GSA on that as soon as we get the temporary quarters lined up.

Chairman CRANSTON. Thank you very much for your fine and very responsive and brief answers to my questions.

Judge NEBEKER. Thank you, Mr. Chairman.

Chairman CRANSTON. It is now my pleasure to recognize my friend and colleague and the ranking minority member of the committee, Frank Murkowski.

#### OPENING STATEMENT OF SENATOR MURKOWSKI

Senator MURKOWSKI. Thank you very much, Mr. Chairman.

I, too, welcome you, Judge Nebeker. We have had an opportunity to visit in my office and I was duly impressed with your commitment, your capability, your background, your experience. I'm sorry I was not here to join with my other colleagues in welcoming your wife, Louana; your daughters, Cara and Meliz; and your son, Mark, as well.

I think that obviously, with young daughters, you are sensitized to many of the issues that have already been brought up concerning the Cosmos Club and others. I won't belabor that.

I noted that your opening statement was very brief. Recognizing that one good turn deserves another, I'm going to enter my rather lengthy statement into the record. So perhaps some day when you

have a break in your activities associated with being the first Chief Judge of the Court of Veterans' Appeals, you can read that lengthy statement. [Laughter.]

[The prepared statement of Senator Murkowski appears on p. 17.]

Senator MURKOWSKI. I think, Mr. Chairman, that the best contribution I can make is to wish our nominee well and look forward to the historic contribution that will be made by Judge Nebeker, and cease. Thank you, Mr. Chairman.

Chairman CRANSTON. Thank you, Frank, for that fine contribution. We appreciate that. [Laughter.]

Thank you very much, Judge, for being with us.

There is now only one other witness to be called, Mr. Rick Heilman of the Disabled American Veterans.

Judge NEBEKER. Thank you, Mr. Chairman. May I take leave?

Chairman CRANSTON. Yes.

Mr. Heilman, you may proceed.

#### STATEMENT OF JOHN F. HEILMAN, NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS

Mr. HEILMAN. Thank you, Mr. Chairman.

Chairman CRANSTON. Your whole statement will go in the record, but please summarize your essential points in 5 minutes.

Mr. HEILMAN. Yes, sir, I will. I'll do it in less than that.

I do want to thank you for the opportunity, for allowing the DAV to participate in this most significant proceeding, the first confirmation hearing for the first Chief Judge of the newly-created Court of Veterans Appeals.

As you will have discerned from my prepared testimony, Mr. Chairman, my comments today do not focus on the nominee himself. We believe Judge Nebeker is eminently qualified to serve in the capacity to which he has been appointed by the President, and we look to favorable and timely action by this committee and the Senate on his confirmation.

Rather, my remarks this afternoon seek to underscore a fundamental perspective that we believe is essential to the role that the Court of Veterans Appeals will play as the new and final arbitrator of factual benefit determinations made by the Department of Veterans Affairs. This perspective, which we believe is evident in the legislative history, especially in the debate that surrounded final congressional passage of the agreement that was fashioned by the two Veterans' Affairs Committees, is simply that a concerted effort was made to preserve to the maximum extent possible the informal, nonadversarial, proclaimant bias of the system—those aspects that exist in the Department of Veterans Affairs adjudication process.

We think there are three key factors of the legislation itself which point to this:

Number one, creation of the article I court itself and the significant authorization for the court to provide for nonlawyer representation before its proceedings;

Number two, the limitation that is placed on article III courts with respect to the prohibition of its jurisdiction for questions of

fact and the application of law and regulation to the facts of a particular case, the so-called "mixed questions of law in fact;" and

Number three, the prohibitions and limitations that are put into effect with respect to fees charged by lawyers who represent claimants before the Department and before the Court of Veterans Appeals.

These aspects, with this underlying perspective, we believe has created an atmosphere whereby the Department of Veterans Affairs and the Court of Veterans Appeals will represent a benchmark in terms of those who believe that alternate dispute resolution mechanisms in mass adjudication systems, such as VA, can be used for a dispensation of timely and cost-effective justice.

Fashioned in this way, we simply wish the new Chief Judge, the Court of Veterans Appeals, and the Department of Veterans Affairs well as they embark on this venture which, again, we believe has the potential to provide for equitable and timely justice for our veterans and their system of benefits and services.

That completes my statement, Mr. Chairman. Again, I thank you for the opportunity to comment this afternoon.

[The prepared statement of Mr. Heilman appears on p. 54.]

Chairman CRANSTON. Thank you very much. I do have one comment regarding a matter in your prepared statement that you did not cover in what you just said.

Frankly, I am genuinely surprised that your organization would suggest to this committee, as your testimony does, that the deliberations in the House of Representatives on the judicial review bill originally passed by that body—which would have transformed the Board of Veterans' Appeals into a 65-member court—are somehow more of "an authoritative source" to look to regarding the new Court of Veterans Appeals than the legislative history in the Senate.

I believe any comparison between the original House-passed bill and the final compromise embodied in Public Law 100-687 will demonstrate numerous, significant differences between the House bill and the final outcome. And, although it hardly seems necessary to say so, we on this committee believe that we had something to do with the shape and content of the final compromise.

In any event, although I am certain Judge Nebeker understands this clearly, let me state it on the record. The most authoritative legislative history on the new public law is the jointly-developed explanatory statement accompanying the final action on the compromise. This joint statement was inserted in the Congressional Record by the two chairmen during final debate on the compromise in each House.

Finally, I want to comment on the references you made in your testimony to my floor statement on the final compromise. These statements by me were not intended in any way to, and did not in fact, relate to the question of attorney representation before the new court. The legislative history on the final compromise expresses no view whatsoever on whether the new court should permit non-attorneys to represent claimants before it. That decision was entrusted entirely to the new court.

In conclusion, I am pleased to lend my support to this nomination. I think veterans can count on firm, thoughtful, and clear lead-

ership from Judge Nebeker in the establishment and operation of this new Court of Veterans Appeals, and I congratulate him again on the high honor and tribute that the President has paid to him in making this nomination.

We will set a meeting off the floor in the next few days to vote on this nomination with the view of obtaining Senate confirmation before the Memorial Day break.

The hearing stands adjourned.

[Whereupon, at 2:14 p.m., the committee was adjourned, to reconvene at the call of the Chair.]



## APPENDIX

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### STATEMENT OF SENATOR DENNIS DeCONCINI IN SUPPORT OF JUDGE FRANK Q. NEBEKER

Mr. Chairman, I rise in support of the nomination of Judge Frank Q. Nebeker to be the first Chief Judge of the United States Court of Veterans Appeals. I have great expectations for him, and am extremely hopeful that Judge Nebeker will set the highest standard for this office.

Mr. Chairman, I am very grateful to you and Senator Murkowski for your thorough but fair consideration of the sensitive issues presented by this nomination. My colleagues have continued to adhere to what I believe to be the highest standard for all Senate Committees involved in the nominations process.

I have reviewed in detail the information provided by the White House and Judge Nebeker. I have found his record on the United States Court of Appeals to be admirable.

Mr. Chairman, I personally met with Judge Nebeker and frankly discussed his membership in both the Lawyers' Club of Washington and the formerly all-male Cosmos Club. I found him to be exceedingly candid and very sensitive on the subject of minority admission development in traditionally all-male clubs. Although his efforts have not culminated in the admission of women into the Lawyers' Club, I am sure he will continue to pursue the

inclusion of women and all minorities despite his non-voting status. I believe his efforts as a member of the Cosmos Club indicate his commitment to effect a change in membership in the Lawyers' Club of Washington within a reasonable period of time.

Again, I think Frank Nebeker's record as a career public servant is to be commended. I wish him well and extend to him my pledge to assist him in any manner I can.

Mr. Chairman, I urge my colleagues on the Committee on Veterans Affairs to extend their support by unanimously approving the nomination of Judge Frank Q. Nebeker to the office of Chief Judge of the United States Court of Veterans Appeals.

STATEMENT OF SENATOR FRANK H. MURKOWSKI(R-AK)  
UPON THE NOMINATION OF FRANK Q. NEBEKER  
TO BE  
THE FIRST CHIEF JUDGE OF THE COURT OF VETERANS' APPEALS

GOOD AFTERNOON.

WE ARE HERE THIS AFTERNOON TO CONSIDER THE NOMINATION OF JUDGE FRANK Q. NEBEKER TO BE THE FIRST CHIEF JUDGE OF THE NEWLY ESTABLISHED COURT OF VETERANS APPEALS. I AM PLEASED TO HAVE THE OPPORTUNITY TO PRESENT JUDGE NEBEKER TO THE COMMITTEE AS WELL AS TO WELCOME HIS LOVELY WIFE LOUANA; HIS DAUGHTER CARA AND HIS SON MARK WITH HIS WIFE TERRY. ANOTHER DAUGHTER, MELIA, AND HER HUSBAND JOHN MONCH ARE NOT ABLE TO ATTEND.

THE PRESIDENT MADE AN EXCELLENT CHOICE IN NOMINATING JUDGE NEBEKER FOR THE LEADERSHIP POSITION ON THE COURT.

- o AT THIS POINT, THE COURT LITERALLY EXISTS ONLY IN CONCEPT AND UNDER CERTAIN PROVISIONS OF LAW.
- o BY NEXT SEPTEMBER, HOWEVER, THE COURT MUST BE COMPLETELY OPERATIONAL AS THE HIGHEST REVIEWING COURT FOR VETERAN ISSUES.

JUDGE NEBEKER WILL FACE TWO MONUMENTAL TASKS:

- O TO GET THE COURT FUNCTIONING ON SCHEDULE;
- O TO MAKE IT FUNCTION FAIRLY AND EFFICIENTLY FROM THE OUTSET.
- O IN BOTH RESPECTS, JUDGE NEBEKER IS THE MAN FOR THE JOB.

FEW PEOPLE KNOW THAT JUDGE NEBEKER WAS ON THE BUILDING COMMITTEE THAT PLANNED THE PRESENT COURTHOUSE OF THE D.C. COURT OF APPEALS: HE

- O SELECTED THE ARCHITECT,
- O HELPED WITH THE FLOOR PLANS,
- O DESIGNED THE OFFICE AND COURTROOM SPACES,
- O BECAME SUCH AN EXPERT THAT SEVERAL STATES THEREAFTER ASKED HIM TO HELP BUILD THEIR OWN STATE COURTHOUSES.

HIS TALENTS WILL CERTAINLY BE PUT TO GOOD USE IN ARRANGING THE BUDGET, FUNDING, SPACE, PERSONNEL, FURNISHINGS, EQUIPMENT, AND SUPPLIES FOR THE NEW COURT. AND THAT'S FOR STARTERS.

ONCE THE COURT BEGINS TO DECIDE CASES, JUDGE NEBEKER'S EXTENSIVE LEGAL EXPERIENCE AND KNOWLEDGE WILL BE OF VITAL IMPORTANCE.

- o 13 YEARS WITH THE DEPARTMENT OF JUSTICE AS A TRIAL ATTORNEY AND AS AN ASSISTANT U.S. ATTORNEY;
- o 18 YEARS AS AN ASSOCIATE JUDGE ON THE DISTRICT OF COLUMBIA COURT OF APPEALS.

THE COURT WILL BREAK NEW LEGAL GROUND WITH EACH CASE DECIDED. UNDER HIS GUIDANCE, I EXPECT THE COURT WILL ESTABLISH A SOLID REPUTATION FOR FAIRNESS AND IMPARTIALITY,

- o IN THE VETERAN COMMUNITY FROM WHICH THE CASELOAD WILL COME,
- o IN THE OVERALL LEGAL COMMUNITY AS WELL.

IT'S IMPORTANT TO REMEMBER THAT FOR THE LAST TWO YEARS JUDGE NEBEKER WAS THE DIRECTOR OF THE OFFICE OF GOVERNMENT ETHICS. THERE HE APPLIED HIS FINE SENSE OF PROPRIETY TO MAINTAINING THE HIGH STANDARDS OF CONDUCT EXPECTED OF OUR PUBLIC OFFICIALS.

VETERANS HAVE EVERY RIGHT TO BE SATISFIED WITH JUDGE NEBEKER'S NOMINATION. HE IS A SCHOLARLY, ARTICULATE, HIGHLY PROFESSIONAL ATTORNEY ON THE ONE HAND, AND A WARM-HEARTED, APPROACHABLE INDIVIDUAL ON THE OTHER. HE ALSO KNOWS WHAT IT'S LIKE TO WEAR OUR COUNTRY'S MILITARY UNIFORM, HAVING DONE SO

HIMSELF FOR EIGHT YEARS AS AN OFFICER IN THE D.C. AND UTAH NATIONAL GUARD.

JUDGE NEBEKER'S WILLINGNESS TO ACCEPT A DIFFICULT ASSIGNMENT ON THE NEW COURT IS CONSISTENT WITH HIS RECORD OF PUBLIC SERVICE. IT IS GOOD NEWS FOR THOSE VETERANS WHO WANT THE SATISFACTION OF HAVING THEIR CLAIM FINALLY DETERMINED IN A COURT OF LAW.

JUDGE NEBEKER, I EXPECT A SPEEDY CONFIRMATION AND WISH YOU WELL AS YOU EMBARK ON WHAT I KNOW WILL BE A FRUITFUL AND REWARDING TOUR OF DUTY AS THE FIRST CHIEF JUDGE OF THE COURT OF VETERANS APPEALS.

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# STATEMENT FOR COMPLETION BY PRESIDENTIAL NOMINEES

## PART I: ALL THE INFORMATION IN THIS PART WILL BE MADE PUBLIC

Name: Nebeker Frank Quill  
(LAST) (FIRST) (OTHER)

Present address: 2360 N. Vermont St., Arlington VA 22207  
(CITY) (STATE) (ZIP CODE)

Position to which Chief Judge, United States Date of  
 nominated: Court of Veterans Appeals nomination: April 5, 1989

Date of birth: 23 April 1930 Place of birth: Salt Lake City, UT  
(DAY) (MONTH) (YEAR)

Marital status: married Full name of spouse: Louana Visintainer Nebeker

Names and ages  
 of children: Caramaria Nebeker 34  
Melia Lynn Nebeker-Monch 31  
W. Mark Nebeker 30

| Education: | Institution<br>(including city and State)     | Dates<br>attended | Degrees<br>received | Dates of<br>degrees |
|------------|-----------------------------------------------|-------------------|---------------------|---------------------|
|            | Ogden High School<br>Ogden, UT                | 1945-48           | Diploma             | 1948                |
|            | Weber Jr. College<br>Ogden, UT                | 1948-50           | A.A.                | 1950                |
|            | University of UT<br>Salt Lake City, UT        | 1950-53           | B.S.                | 1953                |
|            | G.W. U. Law School<br>Washington, D.C.        | 1953-54           | none                |                     |
|            | Washington School of<br>Law, A.U. Wash., D.C. | 1954-56           | J.D.                | 1956                |
|            |                                               |                   |                     |                     |
|            |                                               |                   |                     |                     |
|            |                                               |                   |                     |                     |
|            |                                               |                   |                     |                     |

Honors and awards: List below all scholarships, fellowships, honorary degrees, military medals, honorary society memberships, and any other special recognitions for outstanding service or achievement.

University of Utah Outstanding Alumnus Award

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

## Memberships:

List below all memberships and offices held in professional, fraternal, business, scholarly, civic, charitable, and other organizations for the last five years and any other prior memberships or offices you consider relevant.

| Organization                | Office held<br>(if any) | Dates          |
|-----------------------------|-------------------------|----------------|
| Appellate Judges Conference | Chairman                | 1980-81        |
| American Bar Association    | Member                  | 1970 - present |
| D.C. Bar                    |                         | 1956 - present |
| D.C. Bar Association        |                         | 1956 - present |
| Lawyers Club                |                         | 1979 - present |
| American Law Institute      |                         | 1976 - present |
| Cosmos Club                 |                         | 1985 - present |
| John Carroll Society        |                         | 1986 - present |

Employment record: List below all employment (except military service) since your twenty-first birthday, including the title or description of job, name of employer, location of work, and inclusive dates of employment.

The White House 9/53 - 8/56 - mail, file and record clerk and correspondence secretary

Department of Justice, Internal Security Division, Washington, D.C. 8/56 - 10/58, Trial Attorney

Department of Justice, Washington, D.C. 10/58 - 5/69 Assistant U.S. Attorney, District of Columbia

District of Columbia Court of Appeals 5/69-10/87, Associate Judge

Office of Government Ethics 12/87 - present, Director

## Military service:

List below all military service (including reserve components and National Guard or Air National Guard), with inclusive dates of service, rank, permanent duty stations and units of assignment, titles, descriptions of assignments, and type of discharge.

1948 - 1956 - National Guard Artillery

D.C. and Utah, Second Lieutenant.

Government  
experience:

List any advisory, consultative, honorary, or other part-time service or positions with Federal, State, or local governments other than those listed above.

Consultant to the National Commission on the Reform  
of Federal Criminal Laws.

Member of the Judicial Council Committee to Study the  
Operation of the Bail Reform Act in the District of  
Columbia.

Published  
writings:

List the titles, publishers, and dates of books, articles, reports, or other published materials you have written.

Hints for the Court-Appointed Lawyer in Appellate Cases,  
D.C. Bar Journal, September-October 1967.  
The Judge Needs a Lawyer, Catholic University Law Review,  
Vol. 29, No. 4, 1980.  
Plans, Programs, and Persuasions, The Judges' Journal,  
ABA, Vol. 19, No. 4, Fall 1980.  
About a Friend, The Judges' Journal, ABA, Vol. 20, No. 2,  
Spring 1981.  
Court Management Symposium, The Judges' Journal, ABA,  
Vol. 20, No. 3, Summer 1981.  
An International Education, The Judges' Journal, ABA,  
Vol. 20, No. 1, Winter 1981.

Political  
affiliations  
and activities:

1. List all memberships and offices held in and financial contributions and services rendered to any political party or election committee during the last 10 years.

Republican Party - no activities

2. List all elective public offices for which you have been a candidate and the month and year of each election involved.

None.

Future employment  
relationships:

1. Indicate whether you will sever all connections with your present employer, business firm, association, or organization if you are confirmed by the Senate.  
I will have no such connections. However, I will continue my status as a Senior Judge but will not perform judicial duties with that court.

2. State whether you have any plans after completing government service to resume employment, affiliation, or practice with your previous employer, business firm, association, or organization.

No.

3. What commitments, if any, have been made to you for employment after you leave Federal service?

None.

4. (If appointed for a term of specified duration) Do you intend to serve the full term for which you have been appointed?

Yes.

5. (If appointed for an indefinite period) Do you intend to serve until the next Presidential election?

N/A

Potential conflicts  
of interest:

1. Describe any financial arrangements, deferred compensation agreements, or other continuing financial, business, or professional dealings which you have with business associates, clients, or customers who will be affected by policies which you will influence in the position to which you have been nominated.

None.

\_\_\_\_\_

\_\_\_\_\_

2. List any investments, obligations, liabilities, or other financial relationships which constitute potential conflicts of interest with the position to which you have been nominated.

None.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

3. Describe any business relationship, dealing, or financial transaction which you have had during the last five years, whether for yourself, on behalf of a client, or acting as an agent, that constitutes a potential conflict of interest with the position to which you have been nominated.

None.

4. Describe any lobbying activity during the past 10 years in which you have engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any Federal legislation or for the purpose of affecting the administration and execution of Federal law or policy.

Helped draft and supported the American Bar Association  
Resolution to amend 18 U.S.C. Sections 1983 and 1988  
respecting judicial immunity.

5. Explain how you will resolve any potential conflict of interest that may be disclosed by your responses to the above items. (Please provide a copy of any trust or other agreements involved.)

N/A

Testifying  
before the  
Congress:

1. Do you agree to appear and testify before any duly constituted committee of the Congress upon the request of such committee?

Yes.

2. Do you agree to provide such information as is requested by such a committee?

Yes.

ADDITIONAL QUESTIONS FOR NOMINEES  
TO THE UNITED STATES COURT OF VETERANS APPEALS  
(To be Made Public)

**Bar**

**associations:** List all bar associations and legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

American Bar Association, Judicial Administration Division (council member 1981-82).

Appellate Judges' Conference of the American Bar Association (Chairman 1980-81; Executive Committee 1975-1987; Education Committee 1973-present; Appellate Advocacy Committee 1974-present).

Founder and now on Advisory Committee to the University of Virginia Graduate Program for Appellate Judges; LL.M degree in the Judicial Process. Dan Meador, Director - Phone: (804) 924-3947.

District of Columbia Judicial Conference 1970-present.

Circuit Judicial Conference 1959-present.

**Court**

**admissions:**

List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

District of Columbia Bar

April 23, 1956-present

United States Court of Military Appeals

May 23, 1956-present

Supreme Court of the United States

June 9, 1980-present

**Judicial**

**office:**

State (chronologically) any judicial offices you have held and whether you were elected or appointed to them and provide a description of the jurisdiction of each such court.

Over--

District of Columbia Court of Appeals 1969-1987. Appointed to a 10-year term and reappointed in 1979 to a 15-year term as "exceptionally well qualified." Equivalent of highest state court.

Judicial  
opinions:

If you are or have been a judge, attach a statement providing (a) citations for the ten most significant opinions you have written, (b) a short summary of and citations for all appellate opinions either reversing your decision or confirming it with significant criticism of your substantive or procedural rulings, and (c) citations for significant opinions on federal or state constitutional issues, together with citations for any appellate court rulings on your decisions in those cases. (If any of the opinions listed were not officially reported, please provide copies of the opinions.)

(a)

1. Gaskins v. United States, 265 A.2d 589 (D.C. 1970) (indigent entitled to free transcript).
2. Wise v. Murphy, 275 A.2d 205 (D.C. 1971) (lineup on less than probable cause).
3. United States v. Eley, 287 A.2d 830 (D.C. 1972) (lineup order - discovery).
4. In re Osborne, 294 A.2d 372 (D.C. 1972) (right to refuse blood transfusion).
5. Bouknight v. United States, 305 A.2d 524 (D.C. 1973) (bail).
6. Neuman v. Neuman, 377 A.2d 393 (D.C. 1977) (appellate procedure).
7. Powell v. United States, 458 A.2d 412 (1983) (separate statement - prosecutorial argument).
8. Peoples' Counsel v. PSC, 474 A.2d 1274 (D.C. 1974) (rate making - federal supremacy).
9. Penn Mutual Life Insurance Co. v. Abramson, 530 A.2d 1202 (D.C. 1987) (first certified question from Federal Circuit Court - procedure in future cases - wills).

10. In re A.C., 533 A.2d 611 (D.C. 1987)  
(vacated, 539 A.2d 203 (D.C. 1987) pending en banc).

11. Lynch v. United States, 534 A.2d 658 (D.C. 1987) vacated, 541 A.2d 1288 (D.C. 1987) pending en banc (pretrial detention).

12. Ray v. District of Columbia, 535 A.2d 868 (D.C. 1987) (police Retirement Disability Act - remedy).

(b)

Washington v. United States, 328 A.2d 98 (D.C. 1974), reversed 431 U.S. 181 (1977).

Issues: (1) Whether, assuming some testimony before the Grand Jury was to be suppressed, i.e., not considered, could the trial court test the rest of the evidence for sufficiency to support the indictment? (2) Was some testimony of a potential Grand Jury target unconstitutionally received?

The Supreme Court granted review on the second question and reversed my decision which had to be based on an earlier binding United States Court of Appeals decision.

Crews v. United States, 389 A.2d 277 (D.C. 1978), reversed 445 U.S. 463 (1980).

Issue: Whether testimony of robbery victim making in-court identification of defendant is suppressible because defendant was earlier illegally arrested and photographed thus being identified by the victim. Court of Appeals held "yes" over my dissent. Supreme Court reversed.

(Neither Supreme Court opinion made "significant criticism of [my] substantive or procedural rulings." Indeed, in each the contrary is the case.)

(c)

See (b) above. Of course, I wrote no opinions on state constitutional law as only federal constitution applies in the District of Columbia. In addition to those opinions listed in (a) above involving constitutional issues, I estimate that about 50 percent of my opinions involved constitutional questions ranging from the second amendment (the militia) to fourth, fifth, sixth, and eighth amendments and article I sec. 8 (seat

of government provision). Any constitutional decision is quite significant, especially in the search and seizure area because courts seem to engage in a case matching exercise to see if the case under review can be fit into a previous one. Given the announced intent to examine my opinions, I am confident that my approach to the constitution will surface. Aside from (b) above, I do not recall any other opinions of real moment.

Speeches:

Attach copies of all speeches you have given on issues involving constitutional law, legal policy, or matters relating to veterans' benefits. If there were press reports to any such speeches and they are readily available to you, please provide them.

None.

Legal career:

1. Attach a chronological description of your law practice and experience after graduation from law school, including (a) whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk, (b) whether you practiced alone, and if so, the addresses and dates, and (c) the dates, names, and addresses of law firms or offices, companies, or governmental agencies with which you have been connected, and the nature of your connection with each.

Department of Justice Internal Security Division 1956-58; Assistant United States Attorney 1958-69 (Chief, Appellate Division 1961-69).

(a) No.

(b) No.

(c) None.

2. Describe the general character of your law practice, dividing it into periods with dates if its character has changed over the years.

See "Legal career" above.

Trials and appeals in civil, criminal and administrative cases 1958-69. Chief, Appellate Division 1961-69. Civil and criminal appeals in the District of Columbia Court of Appeals and the United States Court of Appeals 1961-69. As an Assistant United States Attorney much of the practice was in judicial review of administrative

action. Much of the review on the District of Columbia Court of Appeals was of administrative action with many cases involving claimed benefits from job related activity in police and firemen's disability and workers' compensation cases.

3. Describe your typical former clients and the areas, if any, in which you have specialized.

Administrative, civil and criminal for the United States. Appellate practice.

4. State whether you have appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court has varied over time, describe each such variance, giving dates.

Frequently 1958-61; constantly 1961-69 (three to four days a week).

5. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel, and identify the courts.

About 200, including dispositions on motions - sole - United States District Court for the District of Columbia and District of Columbia Court of General Sessions (now Superior Court).

**Litigation:**

Attach a statement describing the ten most significant litigated matters which you personally handled. Give the citations of cases that were reported and the docket numbers and dates of those that were not. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case--

- (a) the date of representation;
- (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
- (c) the names, addresses, and telephone numbers of the individuals who were co-counsel with you and principal counsel for each of the other parties.

Over--

This question might more responsively be answered by a nominee just coming from private practice. My practice, as can be seen from elsewhere herein, predated my last twenty years of government service and, of course, it was government service also.

During my service in the United States Attorney's Office, I can recall I had primary responsibility for a case challenging a Department of Agriculture regulation on "watered ham." The federal court of appeals reversed and hence even today you will see hams labeled "water added." I recall another case challenging a Department of Treasury regulation permitting advertising of "aged neutral spirits." The oak cooperage industry was successful in its challenge. I also had primary responsibility for a case seeking appellate review of FTC regulations under the Textile Fiber Products Identification Act. They were upheld.

I have briefed and argued numerous cases before the federal circuit court en banc on such issues as search and seizure and the insanity defense. In addition, I briefed and argued well over a hundred appeals in the District of Columbia Court of Appeals and the United States Court of Appeals. Of course, the United States Attorneys were the principal counsel. Those living are Judge Oliver Gasch, United States District Court here and David C. Acheson.

I am afraid that much of the data this question calls for is not retrievable; many of the judges and other counsel are now deceased.

Legal

activities:

Attach a statement describing the ten most significant legal activities you have pursued (other than the litigated matters referred to above). Describe the nature of your participation, but please omit any information protected by the attorney-client privilege (unless the privilege has been waived).

See "Bar associations" above.

Since the beginning of my judicial service, I have been actively associated with groups engaged in continuing education of federal and state appellate judges. I have led and continue to lead in these activities. I began by participating on

the faculty of the Appellate Judges' Conference Seminar Series. For the last fifteen years I have served as co-chairman or vice-chairman of the Education Committee which plans the programs. I also serve on the faculty regularly. Each year one-third of the appellate judges attend these seminars; about five are conducted each year. The topics range from new frontiers of the law to procedural innovations for coping with increased case loads.

In my service on the Appellate Judges Conference Executive Committee, I have also planned and taught at numerous seminars on appellate advocacy for lawyers. I was chairman of the Appellate Advocacy Committee of the Conference for many years and developed a model curriculum.

Another aspect of continuing education for appellate judges is the graduate program at the University of Virginia. I helped to found this program and continue to serve on the University Advisory Committee. It is a graduate degree conferring course (LL.M in the judicial process) covering two summers of six weeks each plus a published thesis -- all done under the rigid standards of the University.

Beginning in 1965, I taught as an adjunct professor at American University School of Law. I first taught Criminal Procedure from my own text and outline. Upon assuming the bench, I taught appellate advocacy again from my own prepared material -- much of which is now standard for courses in other law schools and CLE programs.

I have also planned and taught at numerous opinion writing seminars for appellate court law clerks and appellate judges including military courts of appeals.

Outside  
employment:

Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, please provide details.

No.

Party  
affiliation:

State (a) your current political party affiliation and the place and date it was established, and (b)

if you have in the past registered as being with a different party (or as an independent if not now registered as an independent), the place and inclusive dates of such registration.

Virginia registered voter, 1954-present -  
Republican - no formal affiliation.

Memberships in  
certain organizations:

The American Bar Association's Commentary to Canon 2 of its Code of Judicial Conduct states, "It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin." Do you currently belong, or have you belonged, to any organization which discriminates in this manner -- through either formal membership requirements or the practical implementation of membership policies? If so (a) list all such organizations of which you are or were a member, (b) provide the dates of your memberships, and (c) describe in each case the efforts you made to try to change the organization's discriminatory policies or practices.

Consistent with Canon 2 and the commentary, I belong to no organizations which invidiously discriminate. My listing below of certain organizations in no way implies or can give rise to an inference that they invidiously discriminate. Accordingly, the following is listed to accommodate possible differing views.

Boy Scouts (early 1940's) (none)

Vikings Boys Club, Weber Jr. College, Ogden, UT  
(1948-50) (quasi fraternity in Jr. College) (none)

Cosmos Club (1985-present) (Had major part in convincing club board to propose bylaw change to provide for womens' admission. I conducted numerous membership meetings to convince them to vote for it. In May 1988, the bylaws were changed unanimously to admit women. Many now admitted.)

Lawyers Club (1979-present, associate member, non-voting) (Continuing "Cosmos Club" effort - expect success - no clubhouse or formal structure or program, only social.)

Services for  
disadvantaged  
persons:

The American Bar Association in its Comment to Rule 6.1 of its Model Rules of Professional Conduct calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Attach a statement describing what you have done to fulfill this responsibility, listing specific instances and the amount of time devoted to each.

Legal Aid Society, Salt Lake City, UT 1951-52.  
See "Bar associations" above.  
For a judge it is not appropriate to aid one side in possible litigation.

Selection  
process:

Has anyone involved in the process of selecting you as a nominee discussed with you any specific case, legal issue, or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, please explain fully.

No.

*Respectfully submitted*  
*Thorp Z. Nelson*  
*4/12/89*



United States  
Office of Government Ethics

P.O. Box 14108  
Washington, D.C. 20044

April 11, 1989

Honorable Alan Cranston  
Chairman  
Committee on Veterans Affairs  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman:

In accordance with the Ethics in Government Act of 1978, I enclose a copy of the financial disclosure report filed by Frank Q. Nebeker, who has been nominated by President Bush to be the Chief Judge of the United States Court of Veterans Appeals.

We have reviewed the report and have also obtained advice from the Department of Veterans Affairs concerning any possible conflict in light of the Court's functions and the nominee's proposed duties. Based thereon, I believe Judge Nebeker is in compliance with applicable laws and regulations governing conflicts of interest.

Sincerely,

  
Donald E. Campbell  
Deputy Director

Enclosure



United States  
Office of Government Ethics

P.O. Box 14108  
Washington, D.C. 20044

April 18, 1989

Honorable Alan Cranston  
Chairman  
Committee on Veterans' Affairs  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed is a letter from Frank Q. Nebeker to this Office asking that we amend his public financial disclosure report to reflect his and the Federal government's contributions on his behalf to the Thrift Savings Plan. This Office has appended a copy of his letter to his SF 278 and are providing a copy to you for your records. This additional asset would not create any conflict of interest for an individual serving as the Chief Judge of the United States Court of Veterans Appeals.

Sincerely,

  
Donald E. Campbell  
Deputy Director

Enclosure

Judge Frank Q. Nebeker  
2360 North Vermont Street  
Arlington, Virginia 22207

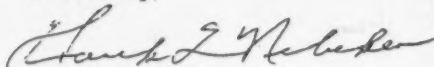
May 11, 1989

The Honorable Alan Cranston  
Chairman  
Committee on Veterans' Affairs  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman:

This is to inform you pursuant to the requirement of 5 U.S.C. 201(b) that since filing my public financial disclosure report dated 3/16/89, a copy of which was provided to you by the Office of Government Ethics, I have received no additional earned income or honoraria other than that from the United States for my service as the Director of the Office of Government Ethics and payments of \$13,905.10 from the District of Columbia government for my annuity as a retired judge of the D.C. Court of Appeals with senior status.

Sincerely,

  
Frank Q. Nebeker

cc: Office of Government Ethics

1

ALAN ORANWITZ, CALIFORNIA, CHAIRMAN  
 SPARK M. MATSUMAGA, HAWAII  
 BENJAMIN DECONCH, ARIZONA  
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 ALAN C. PYAL, MINORITY CHIEF COUNSEL/STAFF DIRECTOR

## United States Senate

COMMITTEE ON VETERANS' AFFAIRS

WASHINGTON, DC 20510-6376

April 10, 1989

Honorable Frank Q. Nebeker  
 2360 North Vermont Street  
 Arlington, VA 22207

Dear Judge Nebeker,

I want to extend to you my congratulations on your nomination by President Bush to be the Chief Judge of the new United States Court of Veterans Appeals. Your nomination is a truly historic occasion.

Since the Court is an entirely new institution, there are a great many administrative and logistical tasks that need to be accomplished in order for it to begin operations, as provided in the Veterans Judicial Review Act, on September 1 of this year. As I believe you are aware, arrangements must be made as soon as possible to obtain space for a courtroom and offices for immediate as well as intermediate and long-term use. In addition, plans and a budget for necessary furnishings, equipment, supplies, and staffing must also be prepared without delay if the Court is to begin functioning efficiently.

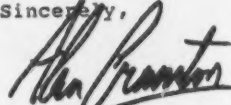
Thus, I would like to assure you that it would not be considered presumptuous for you, during the pendency of your nomination in the Senate, to begin making whatever contacts and plans you consider necessary to ensure that appropriate arrangements are made with respect to matters such as a budget, funding, space, personnel, furnishings, supplies, and equipment for the Court. In this regard, I would note that the September 1 starting date is not readily susceptible to postponement in light of the fact that cases already exist in which the right to appeal to the Court is inherent and their numbers can be expected to grow rapidly in the coming weeks and months.

In connection with the Committee's consideration of your nomination, I request, as has already been discussed with you by Committee staff, that you provide the Committee with a signed statement from your physician as to your current health status. The statement should include descriptions of any current health problems (and any medications prescribed to treat them), and of any problems that have occurred within the past 5 years, that may have a bearing on your ability to carry out the duties of the Chief Judge for the 15-year term for which you have been nominated. This document should be submitted to the Committee in a sealed envelope marked "Attention: Edward P. Scott, General Counsel".

I appreciate your cooperation and look forward to meeting with you in the near future.

With best personal regards,

Sincerely,



Alan Cranston  
Chairman

cc: Honorable Frank H. Murkowski  
Honorable Barbara Mikulski  
Honorable G. V. (Sonny) Montgomery  
Honorable Bob Traxler  
Honorable George M. White  
Richard M. Hadsell

ALAN CRANSTON, CALIFORNIA, CHAIRMAN  
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 STROM THURMOND, SOUTH CAROLINA  
 ARLEN SPECTER, PENNSYLVANIA  
 JAMES M. JOHNSON, VERMONT

JONATHAN R. STERNBERG, CHIEF COUNSEL/STAFF DIRECTOR  
 ALAN C. FYAL, MINORITY CHIEF COUNSEL/STAFF DIRECTOR

## United States Senate

COMMITTEE ON VETERANS' AFFAIRS

WASHINGTON, DC 20510-8375

April 20, 1989

Honorable Frank Q. Nebeker  
 2360 North Vermont Street  
 Arlington, VA 22207

Dear Frank,

It was good to meet with you on April 14 and learn about your thoughts for the new Court of Veterans Appeals. I am writing in follow-up to our discussions in that meeting on the issue of membership in clubs and organizations that have exclusionary membership practices -- including your membership in the Lawyers' Club, a club that has no women members or associate members.

As you will recall, we discussed the American Bar Association's admonition, in the commentary on Canon 2 of its Code of Judicial Conduct, against judges' membership in organizations which practice "invidious discrimination". You related your interpretation of this canon as being directed against discrimination that entails "holding out the excluded as unworthy".

The relevant portion of Canon 2 states: "A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

The relevant portion of the commentary on this point states:

It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin. Membership of a judge in an organization that practices invidious discrimination may give rise to perceptions by minorities, women and others, that the judge's impartiality is impaired. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on the history of the organization's selection of members and other relevant factors. Ultimately, each judge must determine in the judge's own conscience whether an organization of which the judge is a member practices invidious discrimination.

On this issue of what constitutes invidious discrimination, I note the comments made by then-Judge Anthony Kennedy in connection with his December 15 - 17, 1987, confirmation hearing before the Senate Judiciary Committee on his nomination to be an Associate Justice of the Supreme Court. When asked whether any of the clubs to which he

had belonged practiced invidious discrimination within the meaning of the ABA Code, Judge Kennedy replied:

As far as I am aware, none of these policies or practices were the result of ill-will. I recognize nonetheless that real harm can result from membership exclusion regardless of its purported justification. Therefore, I have supported efforts to broaden the membership of clubs to which I have belonged as a circuit judge and have resigned when those efforts have appeared to be unlikely to succeed.

Judge Kennedy further stated that "none of these clubs practiced invidious discrimination. That term is not a precise and crystal clear term." He added: "There is no question that the injury and the hurt and the personal hurt can be there, regardless of the motive."

When Judge Kennedy was asked why it took him so long to resign from the Olympic Club (which excludes women from membership), he responded:

Discrimination comes from several sources. Sometimes it is active hostility. And sometimes it is just insensitivity and indifference. And over the years, I have tried to become more sensitive to the existence of subtle barriers to the advancement of women and of minorities in society. And this was an issue on which I was continuing to educate myself.

Given Judge Kennedy's interpretation of what constitutes invidious discrimination, and based on my own reading of the canon, I am concerned about the interpretation you presented at our April 14 meeting, and invite written amplification from you about the basis for your interpretation and its application to the Lawyers' Club.

With specific regard to your associate membership in the Lawyers' Club, U.S. Circuit Judge Kenneth Starr, who, as you know, has been nominated for the position of Solicitor General, responded to the Senate Judiciary Committee in his Committee questionnaire (pertinent pages are enclosed) that he was an associate member of the Club from December 30, 1987, but had tendered a resignation letter dated March 31, 1989. He stated in the questionnaire: "I have therefore withdrawn from the group, in view of concerns over the appearance of a prospective officer of the Department of Justice serving as a member of a gender-exclusive organization of professionals."

With regard to the possibility of the Lawyers' Club changing its practices of excluding members on the basis of sex, Judge Starr stated in his responses to the Judiciary Committee's questionnaire:

Several months after joining the Lawyer's Club, I indicated to Chief Judge Howard Markey (U.S. Court of Appeals for the Federal Circuit), who is likewise an associate member, that I

would support informal efforts then underway to encourage opening the group to women. I have recently been advised by Chief Judge Markey, that in his considered view, no change in policy is likely to occur in the foreseeable future.

At our meeting, you expressed a different opinion regarding the possibility of a change in membership practices, and I would appreciate your sharing with the Committee the basis for your opinion in this regard. I also invite you to share with us a detailed description of your personal efforts (and copies of any letters or other documents you prepared) to encourage the Lawyers' Club to admit women as members and associate members, as well as the same type of information with respect to your efforts regarding the Cosmos Club.

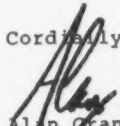
I find myself in agreement with Judge Kennedy's admirable sensitivity on this issue, stressing the impact on and the perception of the excluded rather than the intent or motive of the excluders and referring to his growing sensitivity "to the existence of subtle barriers to the advancement of women and minorities in society." Similarly, Judge Starr seems to have understood well the unacceptable appearance of membership "in a gender-exclusive organization of professionals" on the part of a Department of Justice official. I very much hope that you will reconsider your view on this matter in light of the positions taken and sensitivities displayed by these two prominent jurists.

Finally, to acquaint you further with my position on these matters, I am enclosing a copy of my April 4, 1989, letter to Senator Joseph Biden, Chairman of the Senate Judiciary Committee, concerning the nomination of Vaughn Walker to the U.S. District Court for the Northern District of California.

I look forward to receiving your responses at your earliest convenience.

With warm regards,

Cordially,

  
Alan Granston  
Chairman

Enclosures

cc: Honorable Frank H. Murkowski  
Boyd Hollingsworth

## 1. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (including any former names used.)

Kenneth Winston Starr

2. Address: List current place of residence and office address(es).

6455 Madison Court  
McLean, Virginia 22101United States Court of Appeals  
United States Courthouse  
3rd & Constitution Ave., N.W.  
Washington, D.C. 20001

3. Date and place of birth.

July 21, 1946 Vernon, Texas

- 4.
- Marital Status
- (including maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Married Alice M. Starr  
(Maiden name) Alice Jean MendellAdvertising and Public Relations Consultant  
WEST\*GROUP  
1600 Anderson Road  
McLean, Virginia 22102

- 5.
- Education
- : List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Duke University School of Law  
1970-1973 J.D. (1973)Brown University  
1968-1969 A.M. (1969)George Washington University  
1966-1968 A.B. (1968)Harvard University  
Summers 1967-1968San Antonio College  
Spring 1966 Summer 1964Harding College  
1964-January 1966

## III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

Since 1983, my service as a judge has prevented my engaging in the practice of law in any fashion. Consistent with my judicial responsibilities, however, I have worked actively in organizations or groups seeking to improve the administration of justice, including prison conditions in the United States. For example, I served as a member of the Task Force on Prison Industries, an ad hoc organization formed by Chief Justice Burger to facilitate the development of meaningful training and vocational opportunities for prison inmates. In addition, I have served as a charter member of the Committee on Community Corrections, an ad hoc group of federal and state officials (and the broader legal community) seeking to foster, in an era of overcrowded prisons, public awareness of alternative means of punishment and incarceration. I have also served as chairman of the D.C. Circuit's Committee on the Bicentennial of the Constitution, which has sponsored educational programs related to the Constitution for the benefit of the general public (including students) as well as the bench and bar. Finally, I have been actively involved, including providing in-house legal services, with a non-profit corporation that provides housing for mentally retarded adults in Northern Virginia.

Throughout my work in private practice, I made myself available to handle pro bono matters. Shortly after joining the firm in Los Angeles (in 1974), I handled (successfully) a state criminal charge against an individual. The charge (grand theft auto) was dismissed prior to trial following negotiations with the Inglewood, California prosecutor. I also handled a landlord-tenant dispute for the same individual following completion of the criminal proceedings.

In Washington, D.C., I volunteered for the D.C. Bar's list of attorneys to handle pro bono matters. By referral from the bar, I was primarily involved in a sensitive, protracted domestic relations matter, including obtaining emergency injunctive relief by virtue of spousal abuse difficulties. Ultimately, the matter resulted in a divorce decree to my client's satisfaction.

2. Do you currently belong, or have you belonged, to any organization which discriminates on the basis of race, sex, or religion — through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

For a brief period (from Dec. 30, 1987 until resignation by letter dated March 31, 1989), I was an associate member, Lawyer's Club of Washington. The club is a social organization of lawyers and judges in Washington D.C. It has no place of business, license or the like. It meets periodically as a group for lunches, and has two dinners annually. Several months after joining the Lawyer's Club, I indicated to Chief Judge Howard Markey (U.S. Court of Appeals for the Federal

Circuit), who is likewise an associate member, that I would support informal efforts then underway to encourage opening the group to women. I have recently been advised by Chief Judge Markey that, in his considered view, no change in policy is likely to occur in the foreseeable future. I have therefore withdrawn from the group, in view of concerns over the appearance of a prospective officer of the Department of Justice serving as a member of a gender-exclusive organization of professionals.

Member, United Methodist Men, Trinity Methodist Church, McLean, VA., from 1978-present. I have no plans to withdraw from participation in the United Methodist Men. Each congregation of the United Methodist Church has a women's (United Methodist Women) and men's (United Methodist Men) organization dedicated to spiritual and social purposes. I am aware of no sentiment whatever that these time-honored, religious-related organizations are in any way inappropriate or improper, nor am I aware of any effort (or even any suggestion) within the United Methodist Church to disband such organizations.

ALAN CRANSTON  
CALIFORNIA

## United States Senate

WASHINGTON, DC 20510

April 4, 1989

Honorable Joseph R. Biden, Jr.  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

Dear Joe,

I am returning to you the four blue slips I received from the Judiciary Committee dated March 17, 1989, regarding the nominations of Ferdinand F. Fernandez and Pamela Ann Rymer to the U.S. Court of Appeals for the Ninth Circuit, Robert C. Bonner to the U.S. District Court for the Central District of California, and Vaughn Walker to the U.S. District Court for the Northern District of California. My recommendations are affirmative regarding the Fernandez, Rymer, and Bonner nominations and, for the reasons set forth below, negative regarding the Walker nomination.

With respect to the Bonner nomination, I want to express my objection to the procedure of requesting action on a blue slip for a nomination for which there is, as yet, no vacancy. In this case, the position for which Mr. Bonner has been nominated will not become vacant until Judge Rymer's nomination to the Ninth Circuit has been confirmed. In the interests of assisting the Judiciary Committee in moving ahead as expeditiously as possible with regard to the pending nominations, however, I am returning the Rymer and Bonner blue slips simultaneously. I wish to make clear that I continue to oppose this procedure, and my acquiescence in this instance should not be interpreted as approval of the procedure in the case of future nominations.

With respect to the Walker nomination, I have given careful consideration to whether Mr. Walker should be confirmed for a lifetime appointment to the federal bench. I have reached the conclusion that his actions with respect to his membership in a discriminatory club are disqualifying. His persistent refusal to terminate his membership in this

Page 2

club and his testimony regarding this issue at the Judiciary Committee's hearing in the last Congress demonstrates an attitude and an insensitivity which is unacceptable for a member of the federal judiciary.

The commentary to Canon 2 of the American Bar Association Code of Judicial Conduct explicitly states that "it is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin".

The Judiciary Committee is familiar with the discriminatory membership policies of the club at issue in the Walker nomination -- the Olympic Club of San Francisco -- since these policies were discussed at length during the Committee's consideration of the nomination of Anthony Kennedy in December of 1987.

Judge Kennedy's perception of the problem that arose from his membership in the Olympic Club and his resolution of the issue stand in stark contrast to Mr. Walker's. Judge Kennedy had resigned from the Olympic Club in November of 1987, following a vote by the club's members against a plan that would have admitted women. Judge Kennedy, in his testimony before the Judiciary Committee, demonstrated repeatedly his own growing awareness of and sensitivity to the problems arising from membership in a private club which discriminates against women and minorities and the need for judges to take action to terminate membership in such a club. In response to questions regarding "why did it take so long" for him to resign from the Olympic Club, Justice Kennedy responded:

Discrimination comes from several sources. Sometimes it is active hostility. And sometimes it is just insensitivity and indifference. And over the years, I have tried to become more sensitive to the existence of subtle barriers to the advancement of women and of minorities in society. And this was an issue on which I was continuing to educate myself.

Substantial weight was also given to the fact that Judge Kennedy had previously resigned from a discriminatory club in his home community in 1980. He also testified very firmly and forthrightly that "constitutional and public morality make race or sex distinctions unacceptable for membership" in these private clubs.

The Judiciary Committee in its report on the Kennedy nomination expressed the hope that Judge Kennedy's conduct in resigning from the Olympic Club would set a "positive example

Page 3

for other judges and judicial nominees".

In contrast, for more than a year, Mr. Walker has refused to take such action and, in his testimony before the Committee, attempted to defend the club's discriminatory policies by seeking to cast them in a favorable, but factually incorrect, light.

For example, Mr. Walker testified to the Committee last June, "In the past, there had been no formal exclusion of blacks or, indeed, any other racial minorities". (Transcript, June 13, 1988, p. 38.) That statement is contradicted by an August 8, 1988, letter to the Judiciary Committee from George Riley, the Special Assistant to the San Francisco City Attorney. He stated:

From its inception, the bylaws of the Olympic Club restricted membership to "only white male citizens of the United States of good moral character, integrity and reputation." This policy of racial segregation was challenged in 1967 when community groups and others brought pressure against the Club. Nevertheless, the Board of Directors unanimously elected to retain the whites only membership restriction. A year, later, this ban against minorities was quietly dropped.

Mr. Walker also characterized the Olympic Club as having completed "substantial" change and having "promise of future change" with respect to admission of black individuals to membership. (Transcript, June 13, 1988, p. 41.) Mr. Riley, in his August 8 letter, however, indicated that the club had not admitted any blacks until the spring of 1988 when "in response to the pending lawsuit [by the City of San Francisco against the Olympic Club based upon violations of state civil rights laws], the club announced that it admitted two black men into its membership of more than 4,700 voting members."

The Committee has also received a copy of a press release of the Olympic Club, dated June 30, 1988, describing certain actions taken by the Board of Directors regarding procedures for monetary transactions expressly adopted for the purpose of avoiding coverage under the San Francisco City ordinances prohibiting discrimination by certain clubs. This release which concludes with the statement that the Olympic Club was taking these actions to "defend the fundamental rights of its members against the strong arm of political oppression" is wholly inconsistent with Mr. Walker's characterization of an organization voluntarily moving towards compliance with basic civil rights principles.

With respect to the issue of discrimination against women, the record also indicates numerous statements by Mr. Walker attempting either to defend the club's policies or to diminish the significance of this issue.

For example, he stated in his testimony that the club had defeated "on a very close vote" a referendum to change the bylaws on admission of women to full membership. (Transcript, June 13, 1988, p. 38.) In fact, this referendum -- which is the same vote which precipitated Judge Kennedy's resignation from the Olympic Club -- was defeated by a vote of 1,540 to 2,082.

During his testimony, Mr. Walker stated that a women's athletic club offering athletic facilities was within a block of the Olympic Club and indicated his view that the availability of an alternative facility for women made their exclusion from membership in the Olympic Club "distinguishable" from the exclusion of blacks. (Transcript, June 13, 1988, p. 42.)

Mr. Walker also repeatedly asserted during his testimony that the club was making progress towards eliminating discrimination against women. (Transcript, June 13, 1988, p. 46.) These statements appear to have little factual basis and were refuted in Mr. Riley's letter to the Committee which recites, in detail, the steps the club had taken to defend its discriminatory practices in the litigation brought against the club by the City of San Francisco.

In sum, for well over a year, Mr. Walker has defended his continued membership in this discriminatory club and has failed to acknowledge the impropriety of maintaining membership in such a club and appointment to the federal bench. Although he has expressed his own opposition to the continued exclusion of women from the Olympic Club and urged a repeal of its exclusionary rule, his testimony and statements on the subject demonstrated a fundamental lack of understanding of the significance of this issue. Indeed, his testimony that the existence of a nearby women's athletic club made the issue of invidious discrimination based on sex different from that based upon race suggests a gross insensitivity -- in marked contrast to Judge Kennedy's understanding -- regarding the damage that exclusionary membership policies generate -- even if other facilities are available to serve those denied admission.

This insensitivity is also expressed in the July 18, 1988, letter to the editor of an Olympic Club publication from Mr. Walker. In that letter, one argument he makes is that the

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policy has put nominees to the federal bench, like himself, "on the spot" and that other public servants are "next in line as targets of rules prohibiting or inhibiting membership in a single sex club". Although the same letter begins by urging the change on the basis of "fairness", his emphasis and approach to this issue is, again, fundamentally different from Judge Kennedy's.

The contrast between Judge Kennedy's statements regarding the Olympic Club's policies and those made by Mr. Walker is striking, and, in light of these statements, it is not at all surprising that Judge Kennedy resigned following the defeated referendum on membership for women while Mr. Walker chose to retain his membership.

Mr. Walker's basic perspective on this issue and his defense of the club's position cannot, in my view, be rectified by a belated resignation, calculated to win confirmation rather than prompted by recognition of the impropriety of maintaining such a membership.

There are additional controversies regarding Mr. Walker raised in connection with his demeanor and handling of the Gay Olympics litigation which are relevant in terms of the nominee's potential judicial temperament. These issues have not been satisfactorily factually resolved because, in part, of the assertion of attorney-client privileges. I am persuaded, however, that Mr. Walker's actions with respect to his membership in a discriminatory club are by themselves disqualifying.

For the Senate to approve this nomination would send a very inappropriate message to women and minority individuals in California and throughout the nation. I am unaware of any other instance where the Committee has knowingly approved a judicial nominee who has taken the position espoused by Mr. Walker with respect to the appropriateness of continued membership in a discriminatory club. I urge that the nomination of Vaughn Walker not be approved.

Cordially,

Alan Cranston

Judge Frank Q. Nebeker  
2360 North Vermont Street  
Arlington, Virginia 22207

May 3, 1989

The Honorable Alan Cranston  
Chairman  
Committee on Veterans Affairs  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman:

I have your letter and enclosures of April 20, 1989, wherein you ask that I share further with you my basis for believing that, despite Chief Judge Markey's view, membership in the Lawyers' Club of Washington will soon include women. You have also asked that I detail my personal participation in efforts to encourage that group and the Cosmos Club to admit women.

I do not share Judge Markey's opinion that admitting women into the Lawyers' Club is unlikely in the foreseeable future. I do not know the basis for his view or any factual predicate for it. The club has existed for 87 years. Its most senior member joined in 1939. If I believed as Judge Starr does that Chief Judge Markey is correct, I would have left the club. But I believe that this kind of change can be brought about best from within. And while, indeed, I acknowledge the validity of your point about perception and share it, my view is that more can be done in this instance to bring about change within the group than by shunning it or walking away. To be sure, a group which invidiously discriminates is vastly different. But as Justice Kennedy observed about the difficulty of defining these words, precision is illusive. Nonetheless, resort to the Webster's Third New International Dictionary, 1976 -- a date approximating the time the commentary to Canon 2 was under consideration-- does reveal that the word invidious is about eight or nine on a language "Richter scale." It is a word connoting defamatory, hateful, obnoxious and odious. These words, particularly "odious," are far more severe than the one I used on April 14. "Odiousness" is defined as the state of being subjected to widespread or deep hatred or condemnation often marked by loathing or contempt. As with Justice Kennedy, I would not have joined a group with such practices. But that is a different case from that of a group which, absent those traits, has adhered to an outmoded tradition reflective of a period of male dominated commercialism. It is there that interstitial efforts can be fruitful in overcoming the inertia of the past.

The constitution and bylaws of the Lawyers' Club do not preclude the admission of women. (The occasional use of a masculine pronoun is not, to my knowledge, considered exclusive, but in the vein of its universal usage.) Therefore, no formal written proposals to change a governing document by democratic process have been in order. Thus, my efforts at fostering a change in the practice of all male membership have been to encourage the members to recognize that for our limited purposes women members would be welcomed. These efforts included importuning the past presidents over the years of my associate membership and seeking numerous suggestions from them and the secretary as to the best candidates to propose to break the barrier. I remind you that as an associate member, I do not have a vote. I know of no member who has expressed a negative view to the admission of women, although there is plenty of sentiment against being forced by law to do so. Nonetheless, I adhere to the view that since the group is exclusively for lawyers and judges, it ought to and will react favorably to nominations of women for membership. There are many others in the club working for such result and I have been advised that nominations of women for membership have been recently made and are in the process of being made. I, thus, remain convinced that Judge Markey's prediction is in error.

I observe that any change within the Lawyers' Club must result from a genuine desire not only for such change, but for the benefit of real social and professional companionship of women. To do less would smack of tokenism and be an insult to the women nominated. I will not be a party to such a disingenuous exercise. Accordingly, there is need for delicate planning, which I believe, I can participate in as an associate member to bring about that change. I have spoken to a number of women as to their willingness and desire to join the group.

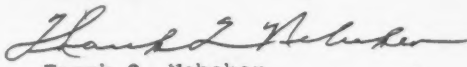
I would like also to address your expressed desire (page 3 of your letter) that I reconsider my view in light of those of Justice Kennedy, Judge Starr, and your reference to your views in your enclosed letter about the Walker nomination. As I said above, if I saw no chance for change, I would have left the club; but I see the change as very close at hand. I trust you do not mean to suggest that I resign simply because of your expressed concern, for I share your view that a belated resignation is subject to an interpretation of being motivated by desire for confirmation and would not be a positive example for other judges and judicial nominees which we both seek. Moreover, I respectfully submit that my open approach to these issues, as evidenced by my efforts to bring about change in the two groups under discussion (one successfully), distinguishes my case from your view of Mr. Walker and dispels any appearance of impropriety from membership as such. In light of your particular interest in ensuring that judicial and other nominees are committed to equal opportunity for women, I add to my response that during the past

18 years as a judge, I have never hesitated to select a woman as my law clerk which my record will reflect.

My efforts at the Cosmos Club date back three or four years. As a new member, I felt any earlier effort would be dismissed as that of an upstart. I have held no office on any standing committee of the club. However, because of my expression of interest in this issue -- particularly to many older active members -- I was asked to serve and did serve on an ad hoc legal affairs committee to deal with this matter. Shortly thereafter, the club Board itself proposed a bylaw change making women eligible for membership. My participation thereafter was extensive, but as with the Lawyers' Club, I drafted no letters or documents. Like Justice Kennedy and Judge Starr, I kept my efforts informal, though I went far beyond a mere offer to support another's effort. It seems to me that a public detailing of my participation in the effort at the Cosmos Club could set a precedent which would operate to chill willingness of others to undertake similar efforts in other clubs. In addition, to do so would involve others who legitimately wish their privacy to be maintained. Accordingly, I prefer simply to describe my participation as quite extensive. I am at liberty, however, to invite you to contact Mr. Tedson Meyers, President of the Cosmos Club, who will verify the extent of my efforts. I believe a member of your staff at our April 14 meeting suggested he knew or had spoken or planned to speak with Mr. Meyers. He can also affirm that many women have been admitted to the club, two of whom I sponsored.

In conclusion, I observe that there seems to be at least two ways of bringing about a societal change reflective of the fact women and minorities are now a part of the mainstream of the nation. One is to bring legal and suasive pressure on exclusive groups. You and others have had success in such endeavors. I, on the other hand, have worked openly from within the two groups to which I belong, likewise with considerable success. Each of us, I submit, has demonstrated a common commitment to equality of reward for each citizen according to ability and without regard for notions of historic prejudices.

Sincerely,

  
Frank Q. Nebeker

STATEMENT OF  
JOHN F. HEILMAN  
NATIONAL LEGISLATIVE DIRECTOR  
DISABLED AMERICAN VETERANS  
BEFORE THE  
COMMITTEE ON VETERANS AFFAIRS  
U.S. SENATE  
May 15, 1989

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

On behalf of the more than 1.2 million members of the Disabled American Veterans (DAV) and its Ladies' Auxiliary, may I express our appreciation for the opportunity to present testimony in connection with the President's nomination of the Honorable Frank Q. Nebeker to be the first Chief Judge of the new U.S. Court of Veterans Appeals (COVA).

Judge Nebeker is, in our view, certainly qualified for this important appointment, particularly given his long and distinguished service as a member of the D.C. Court of Appeals. However, our appearance here today seeks to take advantage of this occasion on the eve of inaugurating a new era in claims adjudication by the Department of Veterans Affairs (VA) to convey a perspective fundamental to us on the special role COVA can and should play in that era.

Mr. Chairman, had the original proponents of judicial review of VA benefit determinations prevailed, today's hearing would not be taking place. For five Congresses in a row, the U.S. Senate passed bills each of which provided for judicial review of VA claims decisions in Article III District Courts or

Courts of Appeals of the United States. Had that legislation been enacted, COVA would not exist, while all the judges necessary to provide such judicial review would. We believe it is important to emphasize why Congress decided this proceeding was necessary.

As noted in the Explanatory Statement on Division A of the Compromise Agreement on S. 11, as amended, the "Veterans Judicial Review Act" (Act), the Senate bill would have provided for judicial review in the Article III Courts of Appeals, while the House amendment "would establish an Article I Court of record to be known as the United States Court of Veterans Appeals." The successful effort waged by the informal conference of the House and Senate Veterans Affairs Committees to forge a workable compromise thus adopted the preference of the House to create COVA as an Article I Court. We therefore look to House deliberations as an authoritative source on why we are here.

For DAV, the essence of the compromise was expressed by the Chairman of the House Committee on Veterans Affairs, who said of judicial review upon House passage of the Act: "[We] think we have preserved as much of the informal and generous nature of the existing [VA adjudication] system as possible." The means with which COVA was empowered by Congress to serve that central purpose are much in evidence. As distinct from the uniform characteristics of Article III Courts, those means

include COVA's discretionary power to prescribe its own rules of practice and procedure and to hear cases by judges sitting alone or in panels at any place within the United States, and the limitation that only disappointed VA claimants may be appellants before the new court. But to us the most significant flexibility, a direct corollary to Congress's intent to preserve the "informal and generous nature of the existing system," is COVA's statutory authority to allow persons other than members of the bar to practice before it.

COVA's authority to admit nonlawyer advocates to its bar reveals, as we see it, Congress's acknowledgement of two paramount truths underlying the VA adjudication system. The first is the dominant role that should continue to be played therein by VA-accredited representatives of the veterans' service organizations (VSOs), who provide their services free-of-charge. For example, nearly 90% of the claims before the Board of Veterans Appeals (BVA) in Fiscal Year 1988 were handled by nonlawyer service representatives from the VSOs, more than 40% being from DAV alone, while less than 2% were handled by attorneys. Reflecting this reality, the Chairman of this Committee said, upon Senate passage of the Act: "I do not believe that most veterans with claims before the VA would be well advised to seek the assistance of an attorney. Certainly, were I asked, my first advice to a veteran with such a claim would be to contact a veterans' service officer."

The second truth is revealed in the desire of Congress to minimize the role of attorneys in the VA adjudication system. Manifestations of that desire in the Act include the prohibition of any fee for representation prior to the first final BVA decision on a claim, the one-year limitation thereafter on compensable representation (which that Committee's chair stated was designed "[t]o reduce the involvement of attorneys at the VA regional office level") and the requirement to file fee agreements with the BVA and COVA, subject to review by each tribunal for reasonableness.

The Chairman's statement about minimizing attorney involvement at the VA regional office level is directed at the principal danger to the "informal and generous" system against which Congress sought to guard: the inevitable formalization of the system that would result from attorney involvement in developing the record at the agency level.

Writing the majority opinion for the U.S. Supreme Court in Walter v. NARS, which upheld the former \$10 limit on fees for representation of VA claimants against a challenge under the Due Process Clause, now-Chief Justice Rehnquist quoted Chief Judge Friendly's critical view of attorney involvement in certain areas of mass justice:

Under an adversary system the role of counsel is not to make sure that truth is ascertained but to advance his

client's cause by any ethical means.... [C]ausing delay and sowing confusion not only are his right but may be his duty.... The result may be to turn what might have been a short conference leading to an amicable result into a protracted controversy.

The House Committee on Veterans Affairs recognized this threat to preserving the value of the current system when it observed, in reporting the bill from which the Act's creation of COVA as an Article I Court and imposition of the fee prohibition were drawn: "In order to preserve as much of the informal and pro-claimant bias of the existing VA claims procedure as possible...the...bill would discourage the adoption of more formal procedures at this level by prohibiting attorneys from charging fees...." The Committee report had earlier stated with respect to the basis for the preexisting fee limit that "the assistance of paid agents and attorneys was not deemed necessary or desirable in the overwhelming majority of cases."

A leading indicator of Congress's concern about the potential adverse effect of attorney involvement in agency record-building is the limitation on the jurisdiction of the U.S. Court of Appeals for the Federal Circuit to hear appeals from COVA decisions. The Act prohibits the Federal Circuit from reviewing challenges to a "factual determination" or to a "law or regulation as applied to the facts of a particular case." The House Committee Chairman stated upon House passage

of the Act: "This language is perhaps as significant as any language in the compromise...." The purpose of the jurisdictional limit is of course to eliminate an inducement for claimant representatives to attempt to develop the agency record as fully as possible in the hope of building in some grounds for reversal on appeal should the claim be disallowed. It is with respect to just such adversarial behavior that Chief Judge Friendly and the Supreme Court warned. What remains of judicial review of the agency's record is confined to COVA, as to which the House Committee Chairman stated on passage of the Act: "We want to give special deference to the VA's case-by-case adjudications...."

Mr. Chairman, in our view, COVA was created and given unusual institutional and decisional flexibility, and the Federal Circuit's appellate jurisdiction was sharply curtailed, in order to "preserve as much of the informal and pro-claimant bias of the existing VA claims procedure as possible...." The primary means to achieve this objective was to create a hospitable climate for nonlawyer advocates and correspondingly minimize the potentially transforming involvement of attorneys in the development of the agency record.

Thus viewed, the reason for this hearing and the underlying purpose of the Act are one: COVA stands as the instrument with which Congress has, in effect, sought to create a ground-breaking national example of an alternative dispute

resolution method -- a means to achieve the benefit of speedy and just results for the nation's veterans and their dependents at minimum cost to them and the government. We wish the new court, and its first Chief Judge, well in this venture of extraordinary potential for the administration of justice in our Federal system of veterans' benefits and services.

This completes my testimony, Mr. Chairman. I would be pleased to answer any questions you or other members of the Committee may have.



*Statement of*  
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from

JOHN F. SOMMER, DIRECTOR  
NATIONAL VETERANS AFFAIRS AND REHABILITATION COMMISSION  
THE AMERICAN LEGION

to the

VETERANS AFFAIRS COMMITTEE  
UNITED STATES SENATE

on

The Nomination of Frank Q. Nebeker to be  
Chief Judge of the U.S. Court of Veterans Appeals

May 15, 1989

STATEMENT OF JOHN F. SOMMER, JR., DIRECTOR  
NATIONAL VETERANS AFFAIRS AND REHABILITATION COMMISSION  
THE AMERICAN LEGION  
TO THE COMMITTEE ON VETERANS AFFAIRS  
UNITED STATES SENATE  
MAY 15, 1989

Mr. Chairman and Members of the Committee:

The American Legion appreciates this opportunity to offer comment on the President's nomination of Frank Guilli Nebeker to be the first Chief Judge of the United States Court of Veterans Appeals.

At the outset, Mr. Chairman, may we say that The American Legion was pleased at the enactment of Public Law 100-687, the Veterans Judicial Review Act. We were especially proud that the Act contained a substantial number of the provisions set forth in H.R. 5039 "Veterans Reassurance Act of 1988," which was introduced on behalf of The American Legion. One of those provisions called for an entity similar to an Article I court, totally independent of the Department of Veterans Affairs, to review veterans cases that have been denied by VA. The Court of Veterans Appeals for the most part embodies our philosophy that such an entity should be free of political, economic and budgetary constraints and not bound by the regulations, guidelines and administrative determinations of VA.

As this Committee is aware, The American Legion, as governed by its Congressionally-approved charter and its Constitution and By-Laws, has been and continues to be a non-political and non-partisan organization. As such, the Legion has consistently refrained from endorsing candidates for public office. It has also been the consistent policy of this organization that the President of the United States has and should have, the prerogative of appointing officers of government in whom he has confidence. This is true in the case of the Chief Judge, and on that basis, we formally

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state to the Committee that The American Legion has no objection to the appointment of Judge Frank G. Nebeker to be Chief Judge of the United States Court of Veterans Appeals.

Having set forth those parameters, we are pleased to say that we had the opportunity of having Judge Nebeker address a recent meeting of The American Legion's Veterans Planning and Coordinating Committee, which is chaired by National Commander H.F. "Sparky" Gierke. He stated at that time that if confirmed by the Senate, he would hold to his legal philosophy: "Don't decide issues you don't need to decide." Further, he stated that in his opinion people want a decision, not a Rembrandt painting. We can certainly find no fault with that philosophy.

Mr. Chairman, we are aware of the fact that there is a great deal of work that needs to be done very quickly if the Court of Veterans Appeals is to become active on September 1, as was set forth in the law.

As far as we know, at this time there are still no rules, no money, no offices and no support staff. All of these things have been held up subject to the confirmation of the Chief Judge, with the exception of \$3.1 million that has been included in the supplemental appropriation for FY 1989 that is winding its way through Congress, and the nomination of one associate judge by the President.

We trust that both the Congress and the Administration will ensure that sufficient resources are available for the establishment and implementation of the Court.

For a number of years, The American Legion has been monitoring the entire claims process, not to mention the fact that for more than sixty years we have been assisting veterans in the development and presentation of their claims. In our judgment there are very clearly a number of chronic problems that have been directly affecting veterans and the Department of Veterans Affairs' ability to fulfill its mission. We have

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testified on numerous occasions before this Committee and others concerning a variety of administrative and budgetary problems and their impact on the quality of the processing of claims at both the Regional Offices and the Board of Veterans Appeals. Many of the problems have continued to exist including the need for improvements in due process procedures, strengthened quality control, and the persistent staffing cuts imposed on the Veterans Benefits Administration, formerly the Department of Veterans Benefits. Although PL 100-687 obviously cannot do anything about the staffing, it does impose improvements in some other troublesome areas. These include provisions relating to reopening of cases, independent medical expert opinions, reasonable increases in attorney fees, and other changes which should prove advantageous to veterans. We will be monitoring the implementation and application of these provisions very closely.

Additionally, while The American Legion does not endorse candidates for Federal office, we do, as the nation's largest and fastest growing veterans organization, reserve the right to express our judgment on how well the Court of Veterans Appeals serves the needs of America's veterans and their dependents and survivors.

Once again Mr. Chairman, we thank you and the Members of the Committee for this opportunity to present our views.

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